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In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 93

HENRY T. McKINNEY,

Petitioner,

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Comes now the respondent, Missouri-Kansas-Texas Railroad Company, and prays that the petition filed herein for a writ of certiorari be denied.

QUESTION PRESENTED

Petitioner has inaccurately stated the question presented. He says the question is "Whether, by virtue of Section 9 of the Universal Military Training and Service Act of 1951, petitioner, who had been promoted to an advanced position upon his return from military service, was entitled to seniority in the new position from the date he

would have obtained it had he remained in the continuous employment of the respondent." In effect, petitioner assumes the ultimate question at issue, or begs the real question. We believe the real question is whether petitioner, an employee in Group 2 classification when he entered military service, has an absolute and unqualified right under the collective agreement to be assigned, upon his return from military service, to a position in Group 1 classification.

STATEMENT OF THE CASE

This action was instituted against Missouri-Kansas-Texas Railroad Company by Henry T. McKinney, an honorably discharged veteran in the railroad's employ, to enforce reemployment rights under Section 9 of the Universal Military Training and Service Act of 1951, *65 Stat. 75, 50 U. S. C. App. 459, pp. 4-5* (R. 2-5). On its motion, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees was granted leave to intervene (R. 12-14). On March 14, 1956, the United States District Court for the Eastern District of Oklahoma dismissed the action on the ground that the complaint failed to state a claim upon which relief could be granted (R. 15-16). The opinion of the United States Court of Appeals for the Tenth Circuit, affirming, is reported at *240 F. 2d 8*, and its judgment was entered December 22, 1956. The allegations of the complaint, and the proceedings below, may be summarized as follows:

Railroad Company has a labor agreement with Brotherhood of Railway and Steamship Clerks, Freight Handlers,

Express and Station Employees, which has been in effect since August 1, 1925, and that organization represents all classes of clerical, office, station and storehouse employees, including the petitioner.

Employees are divided into Groups 1, 2 and 3, with seniority rights only within their respective group [Rule 1(3)(C), R. 6].

On September 25, 1950, petitioner was regularly employed in the capacity of Relief Clerk-Chief Caller, a position within Group 2 classification of the agreement [Rule 1(2), R. 6].

Petitioner entered the military service, and was discharged September 27, 1952.

While petitioner was in military service, the following positions in Group 1 classification were bulletined, and the positions were filled by non-employees as follows:

Date of Bulletin	*Position*	*Person employed*	*Date started work and date assigned seniority*
9- 8-52.	Bill Clerk	R. F. Fabian	9-15-52
9-10-52	Assistant Cashier	C. B. McCuan	9-22-52

Petitioner was separated from military service effective September 27, 1952, requested re-employment on October 1, 1952, was permitted to take the position of Assistant Cashier, a Group 1 position, on October 7, 1952, first performed compensated service in that position on October 7, 1952, and was assigned seniority in Group 1 as of October 7, 1952. The complaint alleges the petitioner "duly protested" that his seniority date was not correctly

fixed and should have been fixed as of September 8, 1952 or September 10, 1952, the dates the positions in Group 1 were bulletined.

On September 4, 1953, the position of Assistant Cashier was abolished and on September 5, 1953, petitioner was assigned the position of Relief Clerk-Chief Caller, which position he has since held. The complaint alleges that on September 2, 1953 the petitioner "duly requested" he be permitted to exercise superior seniority to R. F. Fabian and displace Fabian as Bill Clerk, but was refused on the ground Fabian had a superior seniority rating.

Petitioner seeks relief on two grounds: That his seniority be fixed as of September 8, 1952, or September 10, 1952, the dates the Group 1 positions were bulletined while petitioner was in the military service, which would give him a seniority rating superior to Fabian and which would permit petitioner to displace Fabian in the position of Bill Clerk; and petitioner seeks the further relief that he be permitted to recover as damages the difference in wages between the Group 1 position of Bill Clerk and the Group 2 position of Relief Clerk-Chief Caller since September 5, 1953.

ARGUMENT

We believe petitioner has reasoned on a false premise, and therefore his conclusions are not correct. The collective agreement, attached to and being an essential part of the complaint, contains certain rules which petitioner con-

tinues to ignore, and which rules preclude the granting of the relief sought (R. 5-9).

Group 1 employees are clerks, sub-foremen, assistant foremen, sub-storekeepers, and city ticket agents, and are all clerical employees who regularly devote not less than 4 hours per day to the enumerated types of highly skilled clerical work, and they are designated as Clerks [Rule 1(1), R. 5].

Group 2 employees are classified as other office and station employees, and those in this classification perform duties requiring varying degrees of skill, and they include office boys, messengers, train announcers, gatemen, train and engine crew callers, telephone operators, elevator operators, and many others [Rule 1(2), R. 6]. We believe it is significant to note at the outset that there is little if any relation between the types of duties in the two Groups, which we believe is important in view of petitioners' contention that he was entitled to be "promoted" from Group 2 to Group 1.

Rule 1(3)(A), (R. 6) provides expressly that "promotion will be confined to the group herein named" (Group 2), and when considering the obvious difference in types of employees who would be reasonably required to perform the wholly unrelated duties in each group, it becomes clear why any right of promotion should be so confined or limited. The rule does provide that Group 2 employees will be given preference over non-employees in the assignment to Group 1 positions, based on fitness and ability. It seems clear that moving a Group 2 employee to a Group 1

position is exactly what the rule states—an assignment to that position—and not a promotion in the usual sense of the word, which ordinarily depends largely if not entirely on experience in the same type work. But this rule does not mention seniority, only fitness and ability which is an exclusive prerogative of management. How could it be argued reasonably or logically that an elevator operator or train announcer could demonstrate the capacity or ability to operate a calculating machine or operate a city ticket agency?

Petitioner states on page 3 of the petition that under Rule 15 of the agreement an employee returning after a leave of absence had the option of either (1) resuming his former position or (2) "exercising seniority rights to obtain any position bulletined in his absence" (R. 7), completely ignoring Rule 1(3)(C) which expressly provides in part "seniority of employees will be restricted to the respective group in which employed" (R. 6). Manifestly petitioner, under Rule 15, could exercise only the seniority to which he was entitled under Rule 1(3)(C), namely Group 2 seniority. It follows his options were either (1) resuming his former position in Group 2 or (2) exercising seniority rights to obtain any Group 2 position bulletined in his absence.

Petitioner complains that he was not permitted to displace Fabian on the sole ground he had been assigned a seniority date of October 7, 1952. This would imply some arbitrary action on the part of this respondent, when, as a matter of fact, petitioner first performed compensated

service in Group 1 on October 7, 1952, therefore was entitled to seniority only as of that date under Rule 4, reading in part "Seniority begins at the time the employe's pay starts in the respective branch or class of service" (R. 6).

The Act of Congress here invoked protects the returning service man against loss of seniority rights, including all rights which flow as the result of seniority, but to determine those rights we must turn to the provisions of the collective agreement. The Courts below did not ignore the "escalator principle," as petitioner claims, nor did they apply any new and strange "absolute right" test, but on the contrary they followed precedent. The opinion of the Circuit Court largely turns on a construction of Rule 1(3)(A), supra, and in effect holds the right of petitioner to a Group 1 position must come from that rule, if at all. The opinion, reported at *240 F. 2d 8, 10*, states:

> "On the merits we think the decision of the trial court is right. Section 9 of the Universal Military Training and Service Act merely guarantees the returning serviceman the seniority rights he would have had, had he not entered the service. It does not create or vest in a veteran additional rights beyond what he would have had, had he not gone into the service. (Citing Oakley v. Louisville & N. R. Co., 338 U. S. 278; Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, and other cases.) This is sometimes referred to as the escalator principle. It simply means that all of his rights including seniority move on as though he had not left the employ of the company.
>
> "To determine where he would be had he not entered the service and had he remained with the company,

we then must look to the bargaining agreement. The veteran is not to be penalized by reason of military service. (Citing Trailmobile Company v. Whirls, 331 U. S. 40.) The collective bargaining agreement classifies the employees into three Groups. Under the agreement the *rights of the employees predicated upon seniority are expressly confined to members within each Group*, with the further provision that employees in Group 2 have a qualified right to advance to Group 1 when a vacancy occurs. In such case they are given preference to such advancement over non-employee applicants for the vacant spot in Group 1. This right is conditioned however upon a determination that the employee seeking such advancement is fitted and qualified for such position. *Had this vacancy occurred while McKinney was in the employ of the company, he would not have had the absolute right to demand either of these positions over the non-employee applicants.* He could have demanded them only after a determination of fitness and qualification. The so-called escalator clause of the Act would carry forward only such established seniority rights as he had when he entered the service." (Emphasis ours.)

There is no doubt that the decisions of this Court in *Oakley v. Louisville & N. R. Co., 338 U. S. 278; Fishgold v. Sullivan Dry Dock & Repair Corp., 328 U. S. 275; Trailmobile Co. v. Whirls, 331 U. S. 40,* and *Diehl v. Lehigh Valley R. Co., 348 U. S. 960,* have firmly established the so-called 'escalator principle," and it may be that Section 9 of the Universal Military Training and Service Act amounts to legislative approval or codification. Neither here nor in the Courts below do we question the soundness of that established principle. The Circuit Court opinion follows these and other cases relied upon by petitioner, and we believe correctly holds the fact situation as disclosed

by the allegations of the complaint, considered in the light of the collective agreement attached thereto, failed to state a claim upon which relief could be granted. We believe the key to matter is the conclusion of the Circuit Court that "Had this vacancy occurred while McKinney was in the employ of the company, he would not have had the absolute right to demand either of these positions over the non-employee applicants." This being true, absence in military service had nothing to do with petitioner failing to be assigned the Group 1 position.

In the *Oakley* case, supra, this Court clearly defined the "escalator principle" as meaning the returning veteran is entitled to restoration *(338 U. S. at 283)*:

> "'* * * not * * * the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have had if he had remained continuously in his civilian employment."

In view of its determination that McKinney would not be entitled to the asserted right had he remained continuously in his civilian employment, the judgment of the Circuit Court does no violence to the *Oakley* rule, and it cannot fairly be contended the Tenth Circuit held the "escalator principle" inoperative here.

The case of *Bond v. Tennessee Coal, Iron & R. Co., 73 F. Supp. 333*, is closely in point on the facts. There, an assistant payroll clerk entered military service, and on being discharged sought reemployment as payroll clerk,

which would be an advanced position. The collective agreement there provided for promotion on the basis of "ability, physical fitness, and seniority," but relief was denied. The Court concluded that Bond had no fixed or absolute right to promotion under the rule in the collective agreement, that the right of promotion did not depend solely on seniority, and while it may have been the custom to promote the assistant payroll clerk with greatest seniority there was no right of promotion which could be enforced under the Act of Congress. If Bond, with senior seniority under a collective agreement making seniority a factor, was not entitled to relief, we submit that petitioner, working under a collective agreement where seniority is not a factor, could not be entitled to relief.

The case *Raulins v. Memphis Union Station Co. (C. A. 6), 168 F. 2d 466,* involves essentially the same question as is presented here. There, the employees in the particular craft were divided into four groups, with seniority rights restricted to the particular group. One entered military service while employed in one group, and on return sought assignment to a higher classified group on the theory he would have been promoted had his military service not broken his continuous employment. There, the collective agreement provided the employee with greatest seniority in his group or craft would have preference in filling vacancies in higher groups or crafts, with ability also a factor. The Court held that Raulins, at the time he entered the military service, had no fixed right to promotion under any custom or contract, and that while the oldest em-

ployee in point of service was usually promoted, other factors required consideration, and while the Act guaranteed him seniority within his group, it did not guarantee him promotion to vacancies occurring in a higher group.

Additional authorities concerning the "right of promotion" question are collected in the annotation appearing at *29 A. L. R. 2d 1316-1319*. The analysis of a large number of those cases would serve no useful purpose here, and we deem it sufficient to say that but one line of reasoning runs through all these cases, the right of promotion, or assignment to a higher classified position, was not guaranteed by the Act of Congress unless it is an absolute and unqualified right under the collective agreement.

It is not contended that petitioner actually suffered a loss of seniority by reason of his military service, but on the other hand it is admitted his present seniority date in Group 2 is the same as when he entered military service. While serving in the Group 1 position to which he was perhaps erroneously assigned when he returned from service, petitioner continued to accumulate seniority in both groups, and when the Group 1 position was abolished he was restored to the Group 2 position to which his seniority in that group entitled him. Thus petitioner has received full benefits of the "escalator principle," and therefore the *Oakley* and *Trailmobile* cases, supra, have no application, since they deal with loss of seniority.

The case *Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275*, is frequently cited as a leading case. Fishgold sought protection under the Act to give him greater seniority rights because of military service, and in rejecting his claim this Court stated *(328 U. S. at 286)*:

> "* * * We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority means no more."

All later cases on the point deny relief where a step-up, or seniority gain, sometimes referred to as "super seniority," is claimed by the returning veteran. In concluding as they did that to grant the relief here sought would be to grant petitioner a priority gain, the Courts below followed the decisions of this Court.

Petitioner makes much of the fact he was assigned a Group 1 position upon return from military service, and he reasons he thereby in some manner "qualified" for a higher position which was bulletined during his absence. He studiously avoids answers to his contention which were briefed and argued in both Courts below. The opinion of the Circuit Court recognizes the fact this respondent erroneously permitted petitioner to displace McCuan, but observed the rights of McCuan are not involved. We know of only one reported case on the precise point. In *Freeman v. General Motors Corp., 86 F. Supp. 527*, the Eastern

District of Michigan held that when an employer, because of mistake of law, gave veterans greater benefits as to job preference than those contemplated by the Act, the employer was not foreclosed from adopting a subsequent authoritative interpretation of the Act. It would appear this respondent may have been over zealous in protecting the rights of petitioner, and we submit the sound reasoning in the *Freeman* case should be approved by this Court.

If, as contended by petitioner, his "fitness and ability" was determined on October 1, 1952, when he was assigned to the Group 1 position of "assistant Cashier," it does not follow that his fitness and ability to perform any other Group 1 position was thereby determined, but that would still remain a decision for management. He may or may not have been determined fit and able to handle the duties of "bill clerk" (the position then and now occupied by Fabian) or any one of a number of other positions in Group 1. The most that can be said, or established at a trial on the merits, is that if petitioner had remained continuously in respondent's employment he may or may not have been assigned to the position of bill clerk he now seeks. We submit that the Courts below correctly concluded the "escalator principle" guarantees to the returning veteran only such absolute and unqualified rights as could be found in the collective agreement.

Petitioner relies heavily on the case *Diehl v. Lehigh Valley R. Co., 348 U. S. 960*, but that case deals with absolute and unqualified rights under the collective agreement, and is clearly not in point. In the *Diehl* case the

collective agreement provided that a car man helper, after 1160 days' service, would be entitled, absolutely and without considering other factors within employer discretion, to the higher classification of car man mechanic. There the "escalator principle" intervened to protect the "absolute right" of the returning veteran to the position he would unquestionably have obtained, except for military service, based solely on seniority.

The case *Morris v. Chesapeake & O. Ry. Co., 171 F. 2d 579 (C. A. 7)*, is likewise not in point, and the Court distinguished between this case and the *Raulins* case, supra, for the reason the factual situations were different. In the last paragraph the Court in the *Morris* case pointed out "both the terms of the union agreement and the custom decreed that dispatchers be taken after qualification according to their seniority from the telegraphers' roster. Morris, as the senior on the telegraphers' roster, was entitled by that fact to be advanced to dispatcher." The *Morris* case simply recognizes the "escalator principle," which applies only to prevent loss of seniority or loss of rights based on seniority.

Petitioner complains that his case was dismissed and he was deprived of an opportunity to be heard on the merits, but he overlooks the fact his rights are fixed by the collective agreement which was before the Court, and that evidence could not enlarge upon rights there fixed. In rejecting this argument the Courts below concluded no other result could be reached, whether based on the pleadings or on evidence submitted at a trial on the merits.

The late case *Mann v. Crowell-Collier Publishing Co. (C. A. 6), 239 F. 2d 699* is clearly distinguishable, since there the Court was dealing with fixed advancement rights under the collective agreement, based solely on seniority. There the agreement provided that a photo-engraver apprentice with six years' service should be classified as journeyman, and except for military service Mann would have been entitled without question to the advancement.

CONCLUSION

We submit that petitioner misconceives his rights under the collective agreement; that he would have had no fixed or absolute right to be assigned a Group 1 position had he remained in continuous employment; and that his military service and honorable discharge therefrom cannot be held to enlarge those rights.

The opinion and judgment of the Circuit Court is in full accord with decisions of this Court and correctly construes the Act of Congress; fully protects the rights of petitioner under the "escalator principle"; and affords to petitioner every right to which he is entitled under the collective agreement.

WHEREFORE, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have today served a copy of the foregoing Opposition to Petition for Writ of Certiorari upon each of the following persons, viz.: J. Lee Rankin, Solicitor General, Washington 25, D. C., and Carroll J. Donohue, 506 Olive Street, St. Louis 1, Mo., by mailing a copy to each of them by first-class mail and depositing said copies in the United States mail, properly addressed to each of them, with postage prepaid.

Dated April 20, 1957.

Of Counsel for Respondent,
Missouri-Kansas-Texas
Railroad Company.